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ROYAL COMMISSION ON MATTERS OF HEALTH AND SAFETY
ARISING FROM THE USE OF ASBESTOS IN ONTARIO

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Resources Committee

180 Dundas Street West
Toronto, Ontario.
Friday,
February 19, 1982

Volume XXXV B

ROYAL COMMISSION ON MATTERS OF HEALTH AND SAFETY
ARISING FROM THE USE OF ASBESTOS IN ONTARIO

VOLUME XXXV

SCHEDULED APPEARANCE OF DR. PAUL KOTIN

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130 Dundas Street West
Toronto, Ontario.
Friday,
February 19th, 1982

Volume XXXV B

5 DR. DUPRE: It is now 10:15, and we have been as you know, scheduled to greet the return of Dr. Paul Kotin, to continue his testimony here. The events that laid the ground work for Dr. Kotin's reappearance took place on July 23rd of last summer, and quite specifically, they are well outlined for the record in volume 21 B of the transcript, at pages 59 to 79.


10 There was of course at that time, a simply voluntary undertaking by Dr. Kotin to return here, arising out of certain lines of questioning that were developed, and are explained in the transcript, and it is a matter of some subsequent discussions and negotiations, that caused the Commission to fix this morning, February the 19th, for Dr. Kotin's return.

15 I think I can now take it as a fact that Dr. Kotin is not with us this morning, and may I now please ask the Commission's counsel Mr. Laskin, if he would be so kind as to place on the record, his account of the discussions with Dr. Kotin, and or with others that caused us to schedule 10:15 this morning for Dr. Kotin's return.

Mr. Laskin.

20 MR. LASKIN: Thank you Mr. Chairman, I'll be happy to do that. Just to put the matter back in perspective, and you have indicated generally how this arose, we will all recall of course that Dr. Kotin was called as a witness by the AIA, and his testimony was led by Mr. Warren on July 22nd and 23rd during our expert testimony on health effects and measurement, and it was at the time when certain cross-examination was directed to Dr. Kotin on other matters, that we adjourned, and adjourned on certain understandings.

25 I think two things are important from the transcript from July 23rd, and I won't take a lot of the Commission's time to go through it, but I think the first thing that's important is the conditions under which Dr. Kotin said he would return, and if I might just take a few moments just to read a couple of brief passages,



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MR. LASKIN: (Cont'd.) he said first of all, at
page 69,

"I would like to come back, but with a Johns-
Manville attorney at my side. I do this with really
no great feeling of sacrifice, because it's great
to come back to Toronto. It's a great place."
And he went on on page 70, ended up by saying,
"I think that's about as far as I dare go in light
of what Mr. Warren has brought up. I will be
delighted to come, and I will come as senior vice
president of Johns-Manville, and that should
immediately remove many of the caveats that have
been uttered today."

Then at page 73 of that transcript, Dr. Kotin again
said,

"And I would be glad to return if the Commission is
kind enough to invite me to return, with counsel,
with the full understanding that the rules of the
Commission make it proper for anybody in the
audience to ask me questions."

And then Mr. McCombie put a question to him,
"Can I ask, and I just ask one question, and that
is whether or not Dr. Kotin is aware of the fact
that this will be accepted by his legal counsel in
Denver. One of our concerns is that he be advised
against returning."

And the witness said,

"I can guarantee you I will return. I won't walk on
water. I shall return. But seriously, I'll be back,
and I don't know how to state it more emphatically."

And as Mr. McCombie asked,

"So you will undertake personally to be back as a

MR. LASKIN (Cont'd.) personal undertaking."

And the witness,

"I'll be back."

And then the one matter that you cleared up Mr. Chairman, was the fact that it appeared that after August 31st, he would no longer be associated formally with Johns-Manville, and at the bottom of page 74, you asked him just in terms of the point that he had raised,

"Your offer to come with a JM counsel to protect that side of the situation is one that holds after August 31st?"

And the witness said,

"That's correct."

So that certainly as of July the 23rd, this Commission was under the impression that he would undertake to reappear, and the only condition of his reappearance would be that he would have his own counsel from Johns-Manville at his side.

The second point that's of some significance from July the 23rd appears at page 76 of the transcript, and that really relates to the Commission's own proceedings, and there in the second paragraph, you said Mr. Chairman,

"Just one point at the moment to settle the possibility of Dr. Kotin's return, the Commission takes this offer as tabled. The Commission of course, will reserve to itself the decision as to when and under what circumstances, and at what time, Dr. Kotin would be invited to return, but as usual, will be guided by the discussions with the parties in terms of the appropriateness of the timing, and so on."

Well, that process of course took place late last fall, and as a result of certain tentative discussions with the parties, and more particularly with the Commission, we determined, at least initially, to hold a schedule of hearings this week, and one of the matters we hoped to do was to complete Dr. Kotin's

MR. LASKIN: (Cont'd.) testimony, and indeed, you then instructed the staff, including myself and Miss Kahn, to see if we could arrange Dr. Kotin's testimony.

I called Tim Hardy to see if I could do precisely that, and Mr. Hardy fairly advised me that that was a matter on which I should deal directly with Dr. Kotin, and with his counsel at Johns-Manville.

I then asked Linda Kahn to get in touch with Dr. Kotin's secretary. She did during the months of November and December of last year, and as a result of that, reached an agreement and understanding that Dr. Kotin would come, and would complete his testimony today, Friday February the 19th.

The message I received from Linda Kahn was that I was to call Mr. Markeson, who I understood to be counsel at Johns Manville. I was to call him in the new year to discuss the ground rules for Dr. Kotin's attendance, as it was put to me.

I called Mr. Markeson on January the 12th, and for the first time, it was indicated to me, a possibility that Dr. Kotin would not come.

Mr. Markeson expressed some regret to me that Dr. Kotin had made the undertaking that he made on July the 23rd, but he went on to say that-his words were, he was ninety to ninety-five percent certain to come. What he requested from me was that I advise him and Dr. Kotin of the questions the Commission was interested in asking Dr. Kotin on February the 19th.

I indicated to Mr. Markeson that as counsel, I couldn't tell him in great detail, and list for him every question that I proposed to ask Dr. Kotin, and indeed even if I could do that, I wouldn't feel bound by it. But I did say to him, as I've indicated to all of our other witnesses, that I would advise him of the areas the commission was interested in hearing him on.

I made it clear to him that I couldn't give him any

MR. LASKIN: (Cont'd.) assurance, or indeed any commitment to advise him of any questioning that any of the other parties may wish to question on.

Mr. Markeson appeared content at that stage with simply knowing what the Commission was interested in. He did express to me his overriding concern, which was that Johns-Manville was a defendant in a very substantial number of lawsuits in the United States. Dr. Kotin was a witness on behalf of the corporation in many of those lawsuits, and hence the concern apparently about his giving testimony here before this Commission.

But as I said, at least on January the 12th, it seemed to me I had a reasonable assurance that Dr. Kotin was coming, and accordingly, I asked Linda Kahn to send out newsletters, which we sent out, and indicated his appearance.

I called Mr. Markeson last week, last Wednesday I believe, February 11th (sic) and told him that the areas of interest the Commission had, at least from my point of view, and without in any way intending to constrain the Commissioners, was threefold.

Number one, standards setting, on which Dr. Kotin had written several publications; secondly, the anti smoking programmes, or the smoking cessation programmes at Johns-Manville; and thirdly, some evidence on what Dr. Kotin perceived to be the proper and appropriate role of a corporate officer of health, which indeed was one of the articles that he had published, and in fact had submitted to us as part of his publication list, when he testified in July of 1981.

Mr. Markeson again expressed his concern over pending litigation, indicated that the first two areas were of no problem, but the third area, the role of a corporate officer of health, gave him some problems, because apparently there is some litigation on precisely that issue, at least in one of the states

MR. LASKIN: (Cont'd.) in the United States.

5 The matter was left on that basis, and Mr. Markeson said he would tell me the following day, or the following two days whether Dr. Kotin would be coming.

10 I, as it turned out, had a hearing out of town, and I asked Linda Kahn to follow the matter up with Mr. Markeson. She did so, and she was told that he was not coming, and as I understand it, and this is my information from Linda, he was not coming, number one, because he didn't have a letter in writing, outlining the Commission's interest - areas of interest and I can tell you quite candidly there was never any discussion as far as I can recollect, of any letter being given.

15 He certainly had, orally, what we wanted.

20 Number two, he didn't have any information from the other parties as to what lines of questioning they were interested in, and certainly that was never - any assurance that I gave him, indeed I couldn't give him that assurance, and wouldn't even if I could. It doesn't seem to me to be an appropriate function of Commission counsel.

25 And finally, Mr. Markeson told me in any event, that now Dr. Kotin had another commitment for February the 19th, which he couldn't break.

30 It was at that point that Mr. Reis became involved in the matter, and I think it fair to say that Mr. Reis has genuinely, and I believe fairly and honestly tried to straighten matters out as between the Commission and Johns-Manville, and myself.

He advised me it had been a misunderstanding, that Dr. Kotin would indeed come, and that we would before the hearing today, receive a letter from Johns-Manville.

35 We have received the letter. It was given to us yesterday. It's dated February 16th, and with your permission Mr.

MR. LASKIN: (Cont'd.) Chairman, I think it should go into the record, and I'd like to read it into the record.

DR. DUPRE: Please do, counsel.

MR. LASKIN: It states as follows.

"Gentlemen: Unfortunately, due to a misunderstanding in communications, Dr. Paul Kotin has scheduled another commitment for February 19, 1982, and will not be able to be present at the Ontario Royal Commission Hearings set for that date. We regret any inconvenience this may cause the Commission, and would ask that Dr. Kotin's testimony be rescheduled for a mutually convenient future date. As was pointed out to the Commission during Dr. Kotin's earlier participation in the hearings, some of the lines of questioning being pursued involve subjects which may be highly relevant to current asbestos litigation in the United States. To assist in assuring that Dr. Kotin will be asked (Reporter's note: This should have been read as, "Dr. Kotin will be able") to respond to as many questions as possible, we would ask that the Commission counsel request that the parties with standing, submit in advance, the questions they wish to ask of Dr. Kotin. With guidance of counsel, Dr. Kotin will review the questions, and identify for the Commission, those areas of questioning which are in conflict with U.S. litigation, and if necessary, provide explanations to the Commission counsel and the other parties, as to why these questions cannot be answered in the context of your hearings.

We realize this request deviates from the normal

5 MR. LASKIN: (Cont'd.) Commission procedures, but
as you are well aware, Johns-Manville
is involved in a vast number of lawsuits in the
United States, and Dr. Kotin participates as a
witness in much of this litigation. We
10 appreciate your understanding of the situation, and
your cooperation in rescheduling Dr. Kotin. If it
would be of any assistance to have Dr. Kotin
respond in writing to any questions of the
Commission prior to his return before the
Commission, he would be glad to do so."
And the letter is signed, James F. Reis.
Which leaves me Mr. Chairman to speak only for
15 myself, with two concerns.

Number one, whether of course we still wish Dr.
Kotin at this stage, is at least in my respectful submission,
something that is very much in the Commission's discretion, as you
in my submission properly indicated way back on July the 23rd,
although certainly I would impose the Commission to hear, and I'm
20 certain you will, other parties' submissions on that question.

Secondly, if Dr. Kotin should return, it seems to
me, the conditions if any under which he comes, are of importance,
not the least of which, important to the integrity of the
Commission's proceedings. And while in my submission, there may not
be any objection to asking the parties if they are prepared to
25 disclose in advance what areas of questioning they wish to pursue,
as Commission counsel, I cannot recommend to you that we agree to
that, as being a situation where the witness will only come if he
receives a positive response from the parties.

My submission to you is, that if we are going to
30 entertain the prospects of Dr. Kotin's future return, it should be
clear that we have a clear commitment that he is coming, without

MR. LASKIN: (Cont'd.) any conditions, other than the one that he originally annunciated, and that is that he be
5 entitled to have his own counsel, who presumably would be there to object to any question that he or she felt was improper or irrelevant, following which this Commission could rule on those questions.

In my respectful submission, he shouldn't be given any different treatment than any other witness that we have had
10 before this Commission, or indeed that we intend to have.

So that's my account of what has transpired Mr. Chairman, and my submissions to you. You may wish to hear from Mr. Hardy, and from the other parties on this question.

DR. DUPRE: Thank you very much counsel, both for
15 your very detailed account, and for the submission that you have made.

It may be appropriate perhaps at this time, to take a ten minute break, so that counsel for any of the other parties may if they wish to reflect on any of this, prepare to give the Commission the benefit of their own observations, and submissions,
20 if any.

Shall we break until say a quarter to eleven?
THE INQUIRY RECESSED

THE INQUIRY RESUMED

DR. DUPRE: Well, we are now reconvened, and the
25 Commission is prepared to hear the opinion and/or submission of any of the parties, in whichever order they wish to proceed.

MR. HARDY: Mr. Chairman.

DR. DUPRE: You wish to begin?

MR. HARDY: Please, I think it might help clarify
30 matters, and therefore make the whole discussion here, go much more smoothly. Mr. Reis would like to clarify one matter with respect to

MR. HARDY: (Cont'd.) interpretation of his letter.
If you would be so kind as to let him speak, I think he could do
5 that in a minute or so.

DR. DUPRE: Do you wish to examine Mr. Reis on
this matter, counsel? Should I ask Mr. Reis to return here as a
witness?

MR. HARDY: I don't wish necessarily to examine him.
He has a statement to make, which he will make.
10

DR. DUPRE: Mr. Reis, given the seriousness of the
matter, could I invite you please, to return to the witness' chair?

MISS JOLLEY: Mr. Chairman, on the understanding that
we would be able to cross-examine the witness on his statement, and
other things?

DR. DUPRE: Well, certainly on his statement, Miss
Jolley. Where other things are concerned, the appropriateness of
questions on such other things are matters on which I'm prepared
to rule.
15

MR. HARDY: As I indicated, Mr. Reis would like to
just clarify one issue with respect to understanding the letter.

DR. DUPRE: Thank you Mr. Reis. I remind you of
20 course now, that I still consider you here in your capacity of a
witness, and accordingly consider you on your oath.

MR. REIS EXAMINATION-IN-CHIEF

THE WITNESS: The only further clarification I would
like to make, I gather from the way the letter was read, and some
25 of the statements that have been made, that there's a feeling that
some of the statements, or the requests put in the letter are
prerequisites for Dr. Kotin's return, and that is not the case.

The request for clarification, and for questions is
not a prerequisite for his return. He will return. The request was
30 made in order to enable him, and counsel with him, to be able to
respond to as many of the questions as he possibly can.

MR. REIS: (Cont'd.) That's the only point I would like to clarify.

5 DR. DUPRE: Do you have any questions to put to Mr. Reis at this time?

MR. HARDY: No Mr. Chairman, I do not.

DR. DUPRE: Are there any other questions.

MR. STARKMAN: Yes, I have some questions.

DR. DUPRE: Mr. Starkman.

10 CROSS-EXAMINATION BY MR. STARKMAN

Q. Mr. Reis, I notice that you signed this letter. I also notice that there's no indication of who typed it, and of where was it typed.

A. It was typed in Denver.

15 Q. It was typed in Denver?

A. Yes.

Q. Are these your words, or were they provided to you by someone else?

A. Those are basically my words, and reviewed, and some minor changes made by legal counsel.

20 Q. And that would be Mr. Markeson?

A. That's Mr. Markeson, yes.

Q. 'Cos I understand what you're saying is, that Dr. Kotin will return.

A. Yes.

25 Q. That's what you're saying. Why couldn't he return today in your understanding?

A. My feeling is that it was a simple misunderstanding, that Mr. Markeson had identified to Mr. Laskin, that we expected, or were requesting something in writing, and as a guideline for Dr. Kotin, and not having received that, Dr. Kotin made another commitment on his own, part of it by asking me, "Had we received a written response?" and I said, "No". And he assumed

30

5 A. (Cont'd.) that that was an indication that he would not be returning at this point in time.

Q. Do you know what that other commitment is?

A. Yes.

Q. Where is Dr. Kotin today?

10 A. Dr. Kotin is in Denver, and he is a member of an organization called The Colorado Commission for Higher Education, and they are meeting today.

Q. Does Dr. Kotin have any involvement with Johns-Manville at this point in time?

A. Yes he does.

Q. What is his position there now?

15 A. He is on a consulting basis. The majority of the time is spent in working with the legal department in the litigation. However, he is also available for consultative services to the Health Safety Environment Department on medical issues.

Q. Well, can you explain what - if Dr. Kotin were returning, when will he return?

20 DR. DUPRE: I think I would have to answer that question, Mr. Starkman. If he were to return, he would return in accordance with the Commission's procedure, which reserves to the Commission, the issuing of an invitation, and the times for which invitations are issued.

25 MR. STARKMAN: Yes. I think my concern Mr. Chairman, is that I was not involved in this process. I understand that that was in fact the procedure that was followed to arrange for Dr. Kotin's return on this date, and nevertheless, despite the following of those procedures, there's been some mix-up, where Dr. Kotin is not here, and I'm trying to determine how we are going to avoid that sort of mix-up again, and that's why I ask the question.

30 I'm really asking for a commitment from the director of Asbestos Policy at Johns-Manville Corporation, who I guess

5 MR. STARKMAN: (Cont'd.) in the course of his duties, also handles matters such as the nonattendance of persons who are consultants to Johns-Manville at various hearings, and I'm asking for a commitment from him, as to when it is that Dr. Kotin will return. Will he return on a date set by this Commission?

10 THE WITNESS: And that is mutually agreeable to him, I think. I don't know any other way to put it. If the Commission sets a date that he already has a commitment on, he is involved in many outside activities as well, and if for some reason he cannot change that commitment, I just don't know any other way to approach a question like that.

15 MR. STARKMAN: Q. I would indicate that it would be impossible for myself to provide the questions that I wish to ask Dr. Kotin prior to his appearance.

A. Sorry?

Q. I'm indicating to you that it's impossible for myself to provide the questions to Dr. Kotin, prior to his appearance at this hearing. Now does that cause you any difficulty?

20 A. It does not cause me any difficulty, no.

Q. So even, according to your belief then, even without the provision of those questions, Dr. Kotin will return.

A. That is the point I have said, yes.

MR. STARKMAN: I have no further questions.

25 MR. MCCOMBIE: If I could just ask a couple of questions of the witness.

CROSS-EXAMINATION BY MR. MCCOMBIE

Q. Mr. Starkman asked you what Dr. Kotin's present function was with Johns-Manville, and you indicated he was a consultant mainly with the legal branch, dealing with the litigation suits. Is that correct?

30 A. Yes.

Q. I'm just curious. When Dr. Kotin was here, in the

5 Q. (Cont'd.) summer, he was at that time, an employee of - I believe a senior vice-president of Johns-Manville.

A. That is correct.

Q. Can you give us some kind of idea what the difference is between his present functions for Johns-Manville, and his former functions, when he was a direct employee?

10 A. He has no responsibility for the administration of the Health Safety Environment Department on a daily basis. He has no direct policy-making responsibilities as a member of the corporate structure.

15 Q. I see. But my understanding is, that he has been involved in a lot of the litigation that has been going on in the States for certainly, prior to I believe, it was August 31st that he resigned his position.

A. Yes, yes.

Q. So he's doing an awful lot of the same things now, that he was doing prior to August 31st.

A. Right.

20 Q. Without the responsibility of being a corporate director.

A. That is correct.

25 Q. Now this misunderstanding that you indicate in your letter to the Commission; a misunderstanding in communications; I'm just wondering if you can clarify that, because certainly, the transcript that was read again into the record today, and makes it pretty clear to us that there didn't seem to be any kind of misunderstanding whatsoever. Dr. Kotin made a very firm commitment, and I thank Mr. Laskin for quoting me in this, and I want to assure the Commission there was no prescience at all. It was, I think, just luck, but that we in fact asked the
30 question whether he would be guided by legal counsel, and he made a personal commitment to return, and then further, on the following

Q. (Cont'd.) page, on page 74, in response to a question from Miss Jolley, he indicated that he would, (and I
5 assume that this is a typo in here), he says, "I will ask", and I would assume that means answer, "Any and every question that I am not proscribed from answering by my attorney".

So clearly it was Dr. Kotin himself was willing to return. I'm wondering what has happened in Denver or elsewhere,
10 between the date that this took place, and February 16, 1982, when this letter was written, and what the misunderstanding was, and who's misunderstanding - whether it was Dr. Kotin that had misunderstood something, or whether it was people in the Johns-Manville legal department, or who exactly misunderstood what.

A. I don't know if you ever find out the complete
15 answer to a misunderstanding. I have tried to narrow it down in my own mind. I think Mr. Laskin described the situation very fairly.

As I can narrow it down, the misunderstanding came in the January 12th conversation between Mr. Markeson in our legal department, and Mr. Laskin.

The other part of the misunderstanding that I think
20 is a fault on my part or anyone else involved in anything - it was Mr. Markeson who said we did not follow up that conversation with something in writing, and that would have avoided what apparently was a misunderstanding in communications between those two gentlemen.

Q. Can I ask one thing to make it extremely clear?
25 We've been told that Dr. Kotin has another engagement today in Denver, I believe you said.

A. Yes.

Q. My understanding is, that that is not the major reason that he is not here with us today.

A. It becomes - no, that becomes the only reason.
30 He has made a commitment as of a week ago Monday, to attend this

A. (Cont'd.) other meeting.

Q. He made a commitment a week ago Monday?

A. Monday.

Q. And Mr. Laskin had talked to his office in mid January about this date.

A. Yes.

Q. So he made a commitment for this date in the knowledge that he had been asked to appear here in Toronto.

A. He had made a commitment with an understanding that no response, no written response had come with the questions, and that there would probably be some delay because of problems in the whole process.

Q. Well, my concern is that we seem to be dealing here with, when we dealt with the witness in the summer, we were dealing with his personal undertaking, and since that time, he has left the employ of Johns-Manville, although he's still a consultant, and all of a sudden, there seems to be some legal people that have got involved, and you indicate that there are discussions with Mr. Markeson, and I gather - my feeling is that it was Mr. Markeson's, and other people in the legal department - their suggestion that this be required - that this list of questions be required, 'cos certainly Dr. Kotin indicated to us that he didn't require a list of questions prior to returning.

A. No, they are fully aware of the fact that the Commission cannot require these questions. If it was their choice, they would say, if the Commission has the power, have the Commission require those questions. But it was explained very clearly that the Commission does not have the power to request this of any of the parties with standing.

Therefore, it was set up as a way of trying to enable Dr. Kotin and the counsel who returns with him, to allow him to respond as freely as he possibly can, having given forethought,

A. (Cont'd.) as much forethought as they possibly could, to each of the areas of questioning.

5 Now if the choice is not to do this, Dr. Kotin has made a commitment to return, and I have been assured by him, that he will return. I can assure you that there is no obstacle within the corporation that is telling him, "Do not return", under any penalty, or without any penalty, and the problem now is to reschedule a date that is mutually convenient, and some way, if 10 anyone is interested in doing it, come up with a way of enabling him to be as open as he possibly can, without infringing on problems that the legal department feels are important to the litigation going on in the United States.

That's the situation.

15 Q. Well, you may excuse my perhaps cynical outlook on this, but we've already had a prior commitment from Dr. Kotin himself that he will return, and now we're getting a second-hand commitment that he will return, and what guarantees can you give us that your commitment is going to be any more binding than his own personal commitment?

20 A. It's unfortunate that you have a cynical outlook like that. I have given you my commitment. I don't know what to do beyond that.

25 Q. Let me ask just one more thing which I think is of some concern to all of us, and that is the question of the litigations currently under way in the United States. I am very interested to know exactly what your feeling is, and I appreciate you're not with the legal department, but what your feeling is as to what - how that is going to fetter in any way the testimony of Dr. Kotin, or any other representative from Johns-Manville.

30 In other words, why are we always hearing about the litigation suits in the United States as some sort of fetter on testimony? What relevance would his testimony here have, to

Q. (Cont'd.) litigation suits in the United States?

5 A. Without going into detail, and I can't, because
I'm not involved in that litigation on a day to day basis - I
have not sat in on any of the trials. I have read some
transcripts from time to time. There are issues that have come up
at this Commission, or could very readily come up at this
Commission, that have a direct bearing on that litigation, according
10 to counsel who are involved at the litigation, and for that reason,
testimony that Dr. Kotin would give here, could then be introduced
in that litigation down there, and yeah, right, I have no - and it's
their decision to be very cautious in that particular area.

MR. MCCOMBIE: O.K., again, I would just like to
state for the record, that I certainly could not undertake to
15 provide a list of questions prior to - if Dr. Kotin is asked to
return.

CROSS-EXAMINATION BY MISS JOLLEY

Q. I'd just like to ask one question, and that was,
that Dr. Kotin, on page 73 of the transcript, made a personal
commitment to me, that he would indeed deal with the issue of
20 corporate responsibility, and the industrial medical officer, and
indeed as it was pointed out earlier, it was one of the items in
his submission to this Commission, and my concern is that Dr.
Kotin will return with his litigation lawyer as you suggest, and
that in fact, we won't be able to ask him any of those questions
at all, because they bear somehow on litigation cases in the U. S.

25 Obviously Mr. Markeson has indicated counsel of
the Commission, that that is the area that they're most sensitive
about. That is the area the litigation cases are handling in the
U.S., and I don't know what the point of his submitting that kind
of material to this Commission, and then having Johns-Manville just
30 throw it in our face.

A. I guess I would only ask that if that is an area

5 A. (Cont'd.) you are very extremely interested in, the way to assure that you get the most responsive answers from Dr. Kotin, is to outline the possible areas in question.

Q. There is nothing in the Public Inquiries Act of Ontario, that requires any of the people with standing to submit questions, and ...

A. I understand that fully.

10 Q. and I state quite categorically that the labour movement in Ontario, is not prepared to issue any questions ahead of time.

A. I understand that fully, and you have spoken your feelings. This was nothing more than a request to the parties with standing.

15 MISS JOLLEY: That's all.

DR. DUPRE: Mr. Lederer.

CROSS-EXAMINATION BY MR. LEDERER

Q. Just following up with the concern that's been raised by the last two questioners, I'm just a little curious.

20 Are you able to give us some guidance as to whether or not there are in fact, areas of questions which Dr. Kotin will not be permitted to answer, by his litigation counsel, or whoever accompanies him here?

A. I can't answer - I can't respond as far as the specific areas, no.

25 Q. But you foresee the possibility that there may be some areas.

A. Yes, I do.

Q. And just to follow up, I think you've already indicated, that you are not able to indicate to us where those areas are going to be.

30 A. No, I'm not.

Q. I presume we can take some guidance from the

Q. (Cont'd.) letter, and the references to litigation. I guess the reference to Miss Jolley's concern that those may be the areas in which we're not going to get some answers.

A. Right. By the same token, Miss Jolley exhibited Dr. Kotin's article there, and I certainly think he can comment on an article that he's already published.

MR. LEDERER: Thank you.

MR. LASKIN: Mr. Chairman, I wonder if I might just ask one question before Mr. Reis leaves the stand?

CROSS-EXAMINATION BY MR. LASKIN

Q. I appreciate Mr. Reis, you may not be able to answer this question, but suppose the question is this.

You have indicated, and indeed Mr. Markeson has indicated to me there are some areas of concern in respect of lines of questioning, and I suppose my question to you is: If a question is put to Dr. Kotin, well, if Dr. Kotin is invited back by the Commission, and if a question is put to him, and his counsel objects to it being answered, will his counsel nonetheless, and will Dr. Kotin abide by the ruling of the Commission, as to whether the question should be answered or not?

A. I can't answer that question.

DR. DUPRE: Mr. Hardy, do you have any final question for Mr. Reis?

MR. HARDY: No Mr. Chairman, I do not.

DR. DUPRE: Mr. Reis, before you step down, could I please ask you a couple of questions?

Mr. Starkman in his questioning to you, I believe stated, as for that matter have Mr. McCombie and Miss Jolley, that he is in no way prepared to submit any questions of any kind, in advance, and your reply, which I believe I am quoting, if not verbatim, as close to verbatim as my memory permits, was, "That does not give me any problem". Is that square with your record?

THE WITNESS: Yes.

DR. DUPRE: Q. Who is, "Me", Mr. Reis?

THE WITNESS: That is me in my position as director of asbestos policy for Johns-Manville.

I cannot speak for our legal counsel, and their concerns, not being totally familiar with their problems in litigation.

DR. DUPRE: Now I just wanted first of all to ascertain that "Me" is James Reis, the director of asbestos policy at Johns-Manville.

Now, at this point counsel, Mr. Laskin, could I ask you please to read once again for my recollection of the paragraph in the letter that deals with, or that purports to deal with the circumstances under which Dr. Kotin wishes to be invited back?

MR. LASKIN: Well, it appears to be the second paragraph, which reads as follows.

"As was pointed out to the Commission during Dr. Kotin's earlier participation in the hearings, some of the lines of questioning being pursued involve subjects which may be highly relevant to current asbestos litigation in the United States. To assist in assuring that Dr. Kotin will be able to respond to as many questions as possible, we would ask that the Commission counsel request that the parties with standing, submit in advance, the questions they wish to ask of Dr. Kotin. With guidance of counsel, Dr. Kotin will review the questions, and identify for the Commission, those areas of questioning which are in conflict with U.S. litigation, and if necessary, provide explanations to the Commission counsel and the other parties, as to why these questions cannot be

MR. LASKIN: (Cont'd.) answered in the context of your hearings."

Do you want the letter?

DR. DUPRE: If you please, counsel.

I think I would like to now read the balance of the letter.

"We realize this request deviates from the normal Commission procedures, but as you are well aware, Johns-Manville is involved in a vast number of lawsuits in the United States, and Dr. Kotin participates as a witness in much of this litigation. We appreciate your understanding of the situation, and your cooperation in rescheduling Dr. Kotin. If it would be of any assistance to have Dr. Kotin respond in writing to any questions of the Commission prior to his return before the Commission, he would be glad to do so."

We realize this request deviates from the normal Commission procedures. I want to return to that line, and my reason for doing so, is that I perceive that we may be in danger of double misunderstanding, and that I think, would be unfortunate for all of us. As I take it, there is a first misunderstanding, that has to do with, as the letter points out, communications in the last several weeks between Dr. Kotin and others with whom he works, or with others with whom he works and our counsel.

Now the second possible area of misunderstanding in my mind, stems from this letter, which coupled Mr. Reis with your own very helpful points, nonetheless leaves me and my colleagues on the possible brink of a second serious misunderstanding, and that is that it might be possible for us to understand this letter as in fact altering fundamentally, the terms of the voluntary undertaking that Dr. Kotin made when he was here.

DR. DUPRE: (Cont'd.) Now at this point, my reading of the second paragraph, which counsel read, does not indicate to me, that were the request made therein to be denied, Dr. Kotin would be unwilling to talk.

However, when I go to the third paragraph, and read the opening words, "We realize this request deviates from the normal Commission procedures", I am on the brink of misunderstanding, because I can certainly confirm that this request does indeed deviate from the normal Commission procedures, and I also must have in the front of my mind, the following, namely that I realize that this request deviates from the voluntary undertaking that Dr. Kotin made here on July 23rd.

In other words Mr. Reis, maybe you can't help me with this, but I want you to have the opportunity to do so if it is possible.

It is not an easy and automatic thing for me at least, to understand this letter as really asking for something, you know, be nice from his point of view, but from the company's point of view, but that is not in any way related to his willingness to come under the original circumstances under which he volunteered to come.

DR. DUPRE: Q. Do you have any comments to make?

THE WITNESS: I'm not sure what you're referring to as far as his original circumstances in volunteering. Is there a specific part of some of the statements that he made that ...

DR. DUPRE: Q. Yes, which are on the public record of this Commission.

THE WITNESS: And these statements are?

DR. DUPRE: Counsel?

MR. LASKIN: Well, I think one can sum it up Mr. Reis, by saying that there was only one condition that Dr. Kotin stipulated for his return, and that was that he have his own counsel

5 MR. LASKIN: (Cont'd.) from your corporation at his side, rather than counsel from the AIA, and there was, as I read the public record, no other condition.

THE WITNESS: And that is the way he will return, if this request is not - the additional request cannot be filled in that way.

DR. DUPRE: Thank you very much Mr. Reis.

10 Mr. Hardy, do you have any further points to make?

MR. HARDY: I don't believe so Mr. Chairman, except to indicate that as counsel to the Asbestos Information Association, we would be glad to help facilitate Dr. Kotin's return in any way that might be possible to you or counsel, if you request it.

15 DR. DUPRE: You may step down Mr. Reis. Thank you very much.

The Commission is now prepared to hear any submission that counsel from the parties wish to make.

MR. STARKMAN: Could we get another five minute recess, after hearing Mr. Reis' testimony?

20 DR. DUPRE: You most certainly may Mr. Starkman. We shall resume about ten past eleven.

MR. LASKIN: Ten past eleven? -

DR. DUPRE: Oh, I'm sorry.

DR. UFFEN: Not five to five.

25 DR. DUPRE: We'll come back when the big hand is at the ... (Loud Laughter.)

THE INQUIRY RECESSED

THE INQUIRY RESUMED

DR. DUPRE: Well, we are now reconvened, and open to submissions. Mr. Starkman?

30 MR. STARKMAN: We are very disturbed about the non appearance of Dr. Kotin today, and are disturbed for two reasons.

MR. STARKMAN: (Cont'd.) One is, it seems to us, that this non-appearance amounts to a breach of Dr. Kotin's personal undertaking to this Commission, that he would appear, and he would appear and answer all the questions that were put to him, subject to being advised by his counsel not to answer these questions.

So we are concerned that this failure of Dr. Kotin to appear, after the normal arrangements having been made, as they are with other witnesses, calls Dr. Kotin's credibility, and in our submission, further, the credibility of his former employer is in some question.

The second reason we are concerned, is that we believe this non-appearance of Dr. Kotin calls the credibility to some extent, of this Commission's procedures.

We view this non-appearance as something to be dealt with by this Commission as a challenge to its authority and its processes, which seem to have been abused in these circumstances.

Now we were not privy, I was not privy to the arrangements that were made for the appearance of Dr. Kotin on this date. However, a letter of Mr. Reis, February 16, puts these arrangements off to a misunderstanding in communications.

What is clear when you read through the letter, is that the Johns-Manville Corporation essentially has two concerns about the appearance of Dr. Kotin.

The first is that he should be given the chance, the opportunity to examine all of the questions that will be put to him at these hearings, prior to his appearance, and I assume the reason that they want that, is because they're concerned about the vast number of lawsuits in the United States, and the effect that his answers might have on those lawsuits.

If you will recall, that was one of the concerns raised by Mr. Warren when Dr. Kotin appeared in July, and I believe

MR. STARKMAN: (Cont'd.) the answer given at that time, an answer which was within the knowledge of the Johns-Manville Corporation and their attorneys is, that that in turn has no relevance in the law of Ontario.

I think it's clear in the law, that in many circumstances, there are criminal and civil proceedings going on simultaneously in Ontario, or there are criminal and arbitration proceedings going on, and this issue is raised time and time again in the Courts, and in the civil proceedings, in that the testimony given at whichever proceeding comes first will have an effect on the second proceeding, and the answer is always that that is not a reason for adjourning, or delaying the proceeding that is scheduled to come on first.

The Public Inquiries Act makes provision that the answers given cannot be used to incriminate the witness personally, and the answers given may be used in a subject - in a further proceeding should they be relevant.

We find it difficult to put any credence in Johns-Manville's suggestion that Dr. Kotin ought not to testify because of the litigation in the United States. As we are all aware, there are numerous lawsuits in the United States. Dr. Kotin has testified many many times prior to August 31st, in the course of those proceedings, and has given depositions prior to trial, and as I understand it has testified at trial, and now, according to Mr. Reis, he is a consultant to Johns-Manville, consultant to their litigation department.

I think if I could put it in the vernacular, he is a professional witness, who goes around from - goes from proceeding to proceeding, attempting to give evidence on behalf of the Johns-Manville Corporation.

So insofar as he has already answered these questions many many times before, I don't see why he should be

5 MR. STARKMAN: (Cont'd.) adverse, or the Johns-Manville Corporation should be adverse to having him answer the questions once again.

10 In page 69 of the transcript of Dr. Kotin's previous testimony, about line 24, Dr. Kotin says, "I would be delighted to come back. In my wildest dreams, I can't conceive of a question that Miss Jolley, or any of her associates can ask that I haven't been asked before and that I'm not prepared to answer, short of my ethics and my morals, and how I treat my wife."

15 In other words, all of these questions, or most of them have been asked of Dr. Kotin, and he's answered them, and he and his attorneys know, or ought to have known that the fact there are pending lawsuits is not a reason for answering it further again. (sic)

20 If we waited for the end of these lawsuits, this Commission, these Commissions would never end, because there is no end in sight to the number of lawsuits. Even the Johns-Manville's corporate records - the number of lawsuits has been growing by some exponential factor over the last few years.

25 So the reason that they don't want to answer because of pending lawsuits, seems to me to be of no significance, and Mr. Reis and his Johns-Manville lawyers ought to have known that.

30 Now as to the main point raised in the letter, which is paragraph two, I think it is worth reading carefully, because we heard the testimony of Mr. Reis concerning it, and this letter was written on February 16th which is just a few days ago, and as I read it, it basically says that they wish that the questions would be provided to Dr. Kotin prior, in advance of his appearance, and then with the guidance of counsel, Dr. Kotin will

5 MR. STARKMAN: (Cont'd.) review the questions, identify for the Commission those areas of questioning which are in conflict with U.S. litigation, if necessary, provide explanations to the Commission counsel and the other parties, as to why these questions cannot be answered in context of your hearings.

10 Clearly what this says, is that you submit your questions, and we'll consider them, and then we're not going to answer some of them, or we may not answer some of them, but we'll tell you why we're not going to answer them. We'll tell you why because we'll explain how they're in conflict with pending U.S. litigation.

15 Now Mr. Reis when he gave his evidence, seemed to me - tried to modify that somewhat, by saying, well, you don't have to ... we agree you don't have to submit the questions in advance, and I can't comment on whether or not they will be answered if they should be asked at the hearing, but what seems clear is, that if questions are asked which are in conflict with U.S. litigation, then Dr. Kotin will not, or is not prepared to
20 answer them.

Now he may change - the future of that position may change, but the way I read the second paragraph, that in fact is what is being said to this Commission.

25 And that statement is in direct conflict to what Dr. Kotin advised us when he was here last time. He said he wanted his lawyer here with him, but that he was prepared to answer the questions.

The issue for your consideration I believe, is what response the Commission should have to the failure of Dr. Kotin to appear.

30 In our submission, the Commission should respond in a direct and forthright manner, and should include the following.

5 MR. STARKMAN: (Cont'd.) The testimony that was given by Dr. Kotin in July, that is the evidence given in-chief in response to questions by his counsel, should be struck from the record.

10 I think it's clear that a witness cannot appear and give evidence in their behalf, and then refuse, or not be made available, or not be available to answer questions concerning that testimony, to have that testimony stand in the record.

Further to that, we note that Dr. Kotin submitted the brief on behalf of the Johns-Manville Corporation, and appeared in the Part One hearing to talk concerning that submission, and we would ask that the Commission strike that submission, and all of Dr. Kotin's testimony in Part One as well.

15 We feel that this is necessary because Dr. Kotin's credibility has clearly been called into question. He came on the 17th (sic) , and when he began to object to answer the questions, the issue in all of our minds was, would he return, when would he return?

20 Everyone who was here on that day, I believe can recall thinking about those questions, and if you read the record, it's clear that he gave his personal undertaking to appear.

25 He said that after August 31st, he would be a private citizen. He didn't mention anything about continuing his association with Johns-Manville. He said he'd be a private citizen, that he would appear, he wouldn't walk on water, but he was coming, he liked Toronto, etcetera, etcetera, and he's not here.

30 And he's not here because of a misunderstanding, which amounts in our submission to the intervention of Johns-Manville, and Johns-Manville's counsel, which really contributed to the creation of this misunderstanding, but Dr. Kotin in his personal capacity could have appeared ... should have appeared ... should have felt an obligation to appear, or to make some personal

MR. STARKMAN: (Cont'd.) effort to explain his non-appearance. After all, it was his personal undertaking upon which the Commission relied.

So I think that because of his actions, and non-appearance, the credibility of Dr. Kotin's testimony has really been called into question. A man who gives that type of undertaking, and then does not appear on the basis of the reasons proffered in this letter, seems to me that the Commission ought not to attach any credence to what evidence was offered, and certainly in light of the fact that we had no opportunity to ask him questions on the evidence that he did offer ... that his testimony should be struck from the record.

But more than that, more than Dr. Kotin's personal non-appearance, I think there is a question of what remedies the Commission has to protect its processes, and to protect its procedures, and in that respect, I would refer you to section 8 of the Public Inquiries Act of Ontario, which provides that, "Where a person without lawful excuse, upon being in attendance as a witness at an Inquiry,

MR. LASKIN: "And upon being duly summoned."

MR. STARKMAN: Oh, "Upon being duly summoned," under section 7, that's part (a), but part (b) says, "Or being in attendance," and a witness basically refuses to answer a question, "To answer any question to which the Commission may legally require an answer, or (c) does any other thing that would, if the Commission had been a Court of Law having power to commit for contempt, have been contempt of that Court, the Commission may state a case to the Divisional Court, setting out the facts, and may on the application of the Commission or the Minister of Justice, and Attorney General, inquire into the

MR. STARKMAN: (Cont'd.) matter," etcetera. And I would urge this Commission to state a case to the Divisional Court of this province, to cite Dr. Kotin for contempt, and to make representations there concerning the remedies that might be had against Dr. Kotin for his contempt of this Commission, and its procedures.

More than that, and in the context of that type of application, I'm very concerned about the role that the Johns-Manville Corporation might have in the non-attendance of Dr. Kotin at these proceedings.

Dr. Kotin gave his personal undertaking that he would come, but all of the discussions about his attendance it seems, took place with the counsel acting for Johns-Manville, and a letter explaining his non-attendance was delivered - was typed in Denver and delivered by the director of asbestos policy of the Johns-Manville Corporation.

It seems to us, without having inquired into all of the facts, that there is an attempt on Johns-Manville's part here, to counsel, or there was in fact a counselling of Dr. Kotin, not to appear on this date, and not to appear at least until this condition of providing the questions was satisfied. And this counselling - counselling of contempt, we believe should also be the matter of an application to the Divisional Court.

So we urge you to - would urge you to state a case to the Divisional Court, to cite Dr. Kotin for contempt, and as well, the Johns-Manville Corporation, for counselling contempt of this Commission, and in the course of those proceedings, there is the opportunity to call witnesses by both Dr. Kotin and the Johns-Manville Corporation, and others, to allow the Court to inquire into the entire circumstances surrounding the non-attendance of Dr. Kotin.

I don't see why this Commission should be burdened

5 MR. STARKMAN: (Cont'd.) with having to make that
type of inquiry. I think that has been specifically delegated to
the Divisional Court, on the making of this type of application,
and during those proceedings, I believe it would be open to the
Commission to make representations that Dr. Kotin, and/or the
Johns-Manville Corporation should be responsible for the payment
of the costs of the appearances of Dr. Kotin at these hearings,
and as well as that portion of today's proceedings which deal with
10 the non-attendance of Dr. Kotin. Those costs are somewhat
substantial to be borne by various parties, and by the public, and
it will all have been wasted and thrown away, because Dr. Kotin
did not make himself available on this date.

15 Furthermore, we suggest that the Commission make a
full report of this proceeding to the Minister of Labour, because
it is only by publicly addressing this issue, and by publicly, by
forcefully bringing it to the attention of the minister, that the
matter can be properly dealt with. We would urge you to do that.

20 We think that it's necessary for this Commission
to take a direct and hard response to the non-appearance of Dr.
Kotin, because in an inquiry of this type, which involves multi-
national corporations who have officers and employees not resident
in the Province of Ontario, we are all aware of the difficulties
of enforcing the attendance of witnesses, and answering the
questions.

25 Johns Manville has standing at this hearing, as
well as other parties who do not have their head offices within
the province. We're not quarrelling with that, but what we are
suggesting is that those parties who are not in the Province of
Ontario, and in this case, particularly Johns-Manville Corporation,
are just taking advantage of that fact. They're taking advantage of
30 the fact that the Commission does not have the subpoena powers
necessary to compel the attendance of those witnesses, and by doing

MR. STARKMAN: (Cont'd.) so, they are holding up the Commission, and the Commission's procedures to ridicule and abuse, and the Commission should take steps to remedy that, and to protect its processes.

Those are my submissions.

DR. DUPRE: Thank you Mr. Starkman.

Miss Jolley, Mr. McCombie?

MISS JOLLEY: On behalf of the Ontario Federation of Labour, I would like to support the points made by Mr. Starkman. I think that both Dr. Kotin and Johns-Manville Corporation have shown contempt to us as participants, and to the Commission, and I ask too, that all of his testimony, his direct testimony be stricken from the records, including the testimony at the Public Hearing Phase One.

I would hope that they would proceed with - not being a lawyer, I'm not familiar with the actual legal aspects, but I certainly think that the charge of contempt against both Dr. Kotin, and J-M be pursued.

I would like to say that the labour movement did in fact pay money to participate in the inquiry during all of this testimony, and I think that as other organizations did, and I think those costs are important, as well as the public cost of the entire Commission, and I do support the issue of reporting this to the Minister of Labour.

Johns-Manville in Ontario, in both their mining operation, and in their operation in West Hill, has been contemptuous of the labour movement, of workers' health, and I think that it's important that they're now not prepared to even cooperate with the Commission, and that would be our submission on behalf of the Ontario Federation of Labour, and most particularly on behalf of the Energy and Chemical workers, who are the representatives of the workers at Johns-Manville both past and

MISS JOLLEY: (Cont'd.) present, and also the Steelworkers, who were the representatives of the miners at the Reeves mine (ph) outside of Timmins.

DR. DUPRE: Thank you Miss Jolley.

MR. MCCOMBIE: I will not be too redundant, and just say that I would support as well, on behalf of Injured Workers Consultants, the submissions that have been made by both Mr. Starkman, and Miss Jolley.

DR. GIBSON: And on behalf of the Toronto Occupational Health Resources Committee, I would also support the recommendations that have been made by Mr. Starkman and Miss Jolley.

DR. DUPRE: Mr. Lederer?

MR. LEDERER: Thank you Mr. Chairman. Mr. Chairman, this is indeed an unfortunate situation. It seems that no matter how seemingly rational the explanations may be, it leaves a rather bad taste in everybody's mouth, as quite clearly demonstrated by the submissions that you've heard to this point.

No answer really is satisfactory. I would have thought though, that the Commission's major concern at this point, would be to see whether or not it was possible to obtain the evidence of Dr. Kotin in a manner which was acceptable to it primarily, and secondarily of course, to the parties involved.

With that in mind, certainly - well, with that in mind, I would think that the question that the Commission might first want to address, is whether or not it wants to engage in what has been called a rather unusual procedure, and allow for these questions to be sent to Dr. Kotin ahead of time.

I would think it a poor precedent for the Commission to act on. However, the Government's primary concern is to see that this Commission obtain the information it needs to provide the Government the advice that it has requested. So that while it would be difficult for us to form our questions to Dr. Kotin in

5 MR. LEDEPER: (Cont'd.) advance, if that were what you were to decide, if you were to feel that it was of extreme importance to get Dr. Kotin here, and if it were going to be of assistance for those questions to be provided, then we would attempt to do that.

10 Again, it seems to me that the question is - can we get Dr. Kotin here? Can we obtain his evidence in a way which is going to have some meaning?

I do have one overriding concern which hasn't really been mentioned yet, and I'm not entirely clear as to whether or not this is something that arises implicitly out of the original condition that counsel be present, or whether it too is something that is now being added to these proceedings.

15 It arises out of the questions which started with Miss Jolley, and proceeded through me, and ended I thought, rather astutely with Mr. Laskin's question to Mr. Reis, and that is, whether or not it will be possible to find out prior to the Commission making its decision, whether we can anticipate that Dr. Kotin will abide by the rulings of this Commission.

20 If as a practical matter, we are told that he will not, then it seems to me that there's a real risk of Dr. Kotin appearing, and this entire proceeding being made a mockery, by the refusal to answer what I presume will be questions that the parties consider to be of great relevance.

25 If there is some possibility that Dr. Kotin is going to appear, and simply refuse to answer a string of questions, then I have some question as to whether or not there's much utility in his appearing.

30 I would suggest that the Commission instruct its counsel Mr. Laskin, to make some inquiries, to discover whether or not we can have an undertaking that Dr. Kotin will abide by the rules of this Commission, and with that undertaking in hand, or

MR. LEDERER: (Cont'd.) with a refusal to act under such an undertaking, the Commission will, it seems to me, be in a far better position to consider whether or not it can get Dr. Kotin's evidence in a manner which really is acceptable.

I've only one further comment to make, and that relates to the suggestion made by Mr. Starkman, that his evidence to this point be struck from the record.

It would seem to me that if we hear no more from Dr. Kotin, then the weight of his evidence to date will be greatly affected, but that seems to me to be something that is in the discretion of the Commission, as it comes time to make its decision. I think that it would be unduly harsh to now arbitrarily strike his evidence from the record. It would seem to me that the Commission would want to maintain that evidence, in order that it may make whatever use of it it sees fit, having regard of course, to everything which has happened, and may yet happen with respect to that evidence.

That's really all that I have to say, Mr. Chairman.

DR. DUPRE: Thank you Mr. Lederer.

Any further submissions?

MR. HARDY: Mr. Chairman, I disagree strongly with the suggestion that either Dr. Kotin or Johns-Manville have shown contempt for this Commission, in the misunderstandings that have led to Dr. Kotin not being here today.

I believe fully, the representations of Johns-Manville and from Mr. Reis this morning, and Dr. Kotin when he was here last summer, that Dr. Kotin is still committed to return to this Commission, and that the only condition on his return is that he be accompanied by counsel from Johns-Manville.

I believe therefore, the proper next step for the Commission, if it feels that its record would continue to be enhanced by having Dr. Kotin back to answer questions, would be to

5 MR. HARDY: (Cont'd.) request Dr. Kotin to come back and to schedule that appearance, at which time, he will be questioned, as he would have been, had it continued in July, and therefore there's no need for these further steps suggested by Mr. Starkman.

10 Given the commitment to return from both Johns-Manville officials and Dr. Kotin himself, the appropriate next step is to invite Dr. Kotin, and arrange a time for that to occur.

As I indicated previously to the extent as counsel for AIA, I can facilitate scheduling that appearance. I would do my utmost to do so.

DR. DUPRE: Thank you Mr. Hardy.

15 MR. LASKIN: Could I just make one or two submissions, Mr. Chairman? I subscribe to a good deal of what Mr. Lederer has said to you, although not everything that he said to you.

20 I think we'd all agree it's perhaps unfortunate as to what has happened today. The one matter that I did not hear from any of my friends in the second row is, whether in fact they wish Dr. Kotin to return, under the conditions that Mr. Reis said he would orally to us today, although albeit not in his letter, and certainly, I invite them to tell us that.

25 I agree with Mr. Lederer that the whole question of Dr. Kotin's prior testimony is something that should be considered ultimately by this Commission. I would be very reluctant to recommend to you that we strike testimony from the record at this stage, if indeed that's possible in any practical and realistic sense.

30 It seems to me, it's very much a matter of weight, and very much a matter of credibility, and at the appropriate time, all of us, including myself, might have some strong submissions as to the credibility to be attached to Dr. Kotin's testimony.

MR. LASKIN: (Cont'd.) I view section 8 of the Public Inquiries Act, which is the contempt section, as really a last resort, and really a grave proceeding that a Commission should only take in the strongest of circumstances. The only possible circumstance that this Commission could act on in my submission to you, is section 8, subsection (c), which indicates that if the Commission had been a court of law, something has been done which would be tantamount to contempt.

A breach of an undertaking as I understand the law, could be tantamount to contempt, but it's also my understanding from at least the little amount of practice that I have done so far, that courts of our province certainly are willing to accept what appears to be a submission as to some misunderstanding, or at least to give a party one opportunity to rectify what has otherwise been a breach of an undertaking.

So my submission to you is, that before this Commission invokes any contempt proceedings, it should certainly accord to Dr. Kotin, as it ought to accord to any witness before it, one opportunity to rectify what has otherwise been a breach of an undertaking, and I certainly would strongly urge you to give that one opportunity to Dr. Kotin.

I apply the same principal to Mr. Starkman's submission as to counselling on the part of Johns-Manville.

The one remaining matter I wish to deal with, is the point that Mr. Lederer raised, and indeed I put the question to Mr. Reis about abiding by the Commission's ruling, because I can well anticipate the very question and the very issue that Mr. Lederer has spoken to, and Mr. Reis has indicated he can't tell us what Commission counsel will do.

I perceive that to be a problem, but it seems to me it's a problem that we can only deal with if Dr. Kotin comes back, and if it arises, and I say that because of this. To me,

MR. LASKIN: (Cont'd.) inquiring in advance, and obtaining some undertaking, is not a terribly practical solution, because if Dr. Kotin is here, as indeed if any witness is here under the Public Inquiries Act, and a question is put, and the witness objects to answering, and the Commission then makes a ruling that the question ought to be answered, the witness can quite properly as the legislature has set up the Public Inquiries Act, or at least, as I understand it, say, "I'm still not going to answer, and I wish a ruling of the Divisional Court before I'm obliged to answer." In other words, what the Public Inquiries Act has done in 1971, what the legislature has done, is take it away from the Commission, any Commission, to ultimately make that ruling, and has said it's open to any party, and any witness, to apply for a ruling from the Divisional Court, as to whether or not the question ought properly to be answered.

Now it seems to me that Dr. Kotin, Johns-Marville, the Ontario Federation of Labour, any party before this Commission, has legally that right under the Public Inquiries Act.

So it seems to me that if the question arises, it may well be that we will have to apply for a ruling from the Divisional Court as to whether the question ought properly to be answered, and if the Divisional Court says, Yes, and then Dr. Kotin still says, No, I'm not going to answer, then in my submission, we might well have reached a stage where section 8 applies, the contempt section, but in my respectful submission, at this stage of the proceedings, he ought to be afforded the opportunity to come back, but only to come back on the same condition that he originally agreed to, that is, with his counsel and no other conditions.

Those are my submissions.

DR. DUPRE: Counsel, as a specific part of your submission, you have included a point of law relating to section 8,

DR. DUPRE: (Cont'd.) subsection (c). May I, for the guidance of the Commission, ask Mr. Lederer, or Mr. Starkman whether they have any particular view on the merits of the point of law you've raised.?

MR. LEDERER: Mr. Chairman, insofar as the point of law, that is the application of section 8 is concerned, I entirely subscribe to the view which has been given to you by your own counsel, Mr. Laskin.

If I might, since you've given me the chance to speak, just respond very briefly to what Mr. Laskin has said, because there seems to be a slight misunderstanding, even between us, as to what I'm suggesting. When I suggest that some approach be made to Johns-Manville or to Dr. Kotin as to whether or not they are prepared to abide by the rulings of this Commission.

I'm not suggesting that this Commission ought to make its decision as to whether or not Dr. Kotin be invited to return based on the response to such an inquiry alone. I'm simply suggesting that with all the codicils that Mr. Laskin has put here, be put to Johns-Manville to Dr. Kotin, and that some initial response be obtained, because I think that that is a fact that would be of some assistance to this Commission in making its decision. I'm not suggesting it ought to be determinative of the issue in and of itself. I don't think properly it should be.

DR. DUPRE: Mr. Starkman?

MR. STARKMAN: Yes Mr. Chairman, I do agree with Mr. Laskin that courts in this province properly give persons a second chance to answer questions, or to make an appearance.

However, it's our belief that Dr. Kotin has had his second chance. He appeared in July, and he didn't want to answer the questions at that time, as he might have been compelled to do, if the matter had gone ahead in the normal course.

He appeared as a witness. He has appeared many many

MR. STARKMAN: (Cont'd.) times as witnesses. His counsel was here, not his personal counsel, but Johns-Manville had taken the - had decided to have Mr. Warren represent their interests on that day, so he had his counsel here. He was not unrepresented.

A few questions were posed. The line of questioning was known to him, at least the initial line of questioning. He objected to answering them. There was a lot of discussion, and it was agreed that he would not be compelled to answer, or no decision would be made at that time, because he would go away, and then come back with his counsel, or with Johns-Manville on another date to answer the questions.

So that was the first time. Today is the second time that he's not here, or has not appeared to answer the questions. So I do agree with Mr. Laskin, the courts will give people a second chance, and in our submission, Dr. Kotin has had his second chance, and he's not here. Now he's asking for a third chance, and Mr. Lederer's suggesting that before we give him his formal third chance, we have an intermediary stage where we write some letters, to determine whether in fact - what the perimeters of his third chance are going to be.

It's our submission that this type of maneuvering is just calling the whole procedure of the Commission into disrespect and making into disarray, that we should have, or the Commission should have to have basically what's amounted to almost a day of hearing, over whether Dr. Kotin should answer some questions, which he says he's answered before, believes he's answered before, and that we should enter into correspondence with the Johns-Manville Corporation, and negotiate with them over the types of questions, the lines of questions, whether or not he's going to answer any specific question.

I don't think that if it was a witness who didn't

MR. STARKMAN: (Cont'd.) have the type of financial backing and international presence, that Johns-Manville has, that this Commission, or anyone else, would consider into entering into those sorts of negotiations with a witness, or witness' counsel over whether or not they ought to be compelled to answer any specific question.

That's what disturbs me, and that's why I think because he's had his third chance - he's had his second chance, and because of his position, involvement, and undertakings, the Commission should not be reticent, or hesitant to take this case forward, because these hearings are just in their approximate mid point, and whatever decisions are made about Dr. Kotin's responsibility and Johns-Manville's responsibilities, and the Commission's approach to them at this time is going to carry forward through the rest of the hearings, and I think the Commission should take the matter firmly in hand, and deal with it accordingly.

DR. DUPRE: Any further submissions?

May I just confer with my colleagues for a moment?

DR. MUSTARD: It would help us if one of the questions that Mr. Laskin posed, were answered, and that is, would the parties wish to further question Dr. Kotin if he were here?

MR. MCCOMBIE: I can answer on behalf of Injured Workers Consultants, and I think that implicit in our concurrence with Mr. Starkman's suggestion, was the fact that if we are asking that previous evidence be struck, that we feel that the breach that was carried out, was serious enough to warrant going to the Divisional Court. Clearly Dr. Kotin's whole credibility has been called into question for us on this, and I would think that that would implicitly indicate that, certainly at this point, we wouldn't push that Dr. Kotin be recalled, and I would ...

Yes, that's all.

MISS JOLLEY: On behalf of the Ontario Federation of Labour, I feel the same way, that I think that his breach was serious enough, and I'm not interested in his coming back.

I think his credibility has been so tarnished, that we aren't interested in hearing from him again.

MR. STARKMAN: Well, I think I differ somewhat from my colleagues on that point, in this respect.

I think that it's ultimately the Commission's decision whether they want to hear the further testimony from Dr. Kotin. We can express our individual wishes, but I think it's the Commission's ultimate decision, and I can't see how, if Dr. Kotin, if the procedures that we have recommended, ... by that, I mean going to Divisional Court, or striking his testimony are not done, then it seems to me that there is some obligation on the Commission to hear the rest of Dr. Kotin's evidence.

I agree that I don't think it will really be of much assistance to us, given his conduct, but I don't think that we can just let the matter lapse by saying, well, we don't want to hear from you now. I think a decision has to be made one way or the other. We can't just sit in the middle, so what I'm suggesting is, that if the procedures are not going to be ... if sanctions of some sort are not taken against Dr. Kotin, then the Commission is obliged to call him, and to hear his evidence, for whatever he has to say.

I would not be content to leave it by saying, well he wasn't here, and therefore we just don't want to hear from him any more, just to leave it at that.

I think that the matter must be resolved in one way or the other, and if Dr. Kotin is going to come, and answer the questions, then I will make every effort to be here, and ask those questions, the ones I wanted to ask back in July.

DR. DUPRE: Is your submission Mr. Starkman, that we

DR. DUPRE: (Cont'd.) should basically invoke the Public Inquiries Act before the Divisional Court, at this time?

MR. STARKMAN: Yes.

DR. DUPRE: And then, whether or not the Court upholds the Commission's submission, arrange for Dr. Kotin to come and answer questions?

MR. STARKMAN: No, I think the question - I was approaching it as if well, do we want Dr. Kotin back? If we don't take any actions, do we want him back, and my answer is, I think that the Commission would feel obliged to hear the conclusion of Dr. Kotin's testimony.

The matter shouldn't just be let lapse.

I made my submissions as to the type of actions I thought you should take. If you were going to strike Dr. Kotin's testimony, then it's struck. We don't have to have him back to listen to the cross-examination, because there's nothing to cross-examine him on.

Clearly he does not wish to be cross-examined on certain areas, and maybe if the Johns-Manville wants to withdraw his entire testimony, then we do not have to proceed with this matter any further, except I still feel strongly that contempt has been shown for the Commission, and the Commission shouldn't let that go by without taking some action, otherwise, you will have done nothing to protect your procedures.

DR. DUPRE: Any further submissions?

DR. GIBSON: I am basically agreed with Mr. Starkman that we have no particular interest in having Dr. Kotin recalled, but if in fact the Commission is not going to take any sort of sanction against Dr. Kotin, then it can't be left in the middle.

DR. DUPRE: Mr. Lederer, do you have a final point?

MR. LEDERER: Mr. Chairman, I think since I differ slightly from my friends, perhaps I ought to say a few words.

MR. LEDEBER: (Cont'd.) Firstly, I agree with Mr. Starkman, that this matter is really one which is in the discretion of the Commission.

As I indicated earlier, if the Commission feels that there is something to be gained by having Dr. Kotin here, if he's got evidence that can assist the Commission, then it seems to me, the question becomes, can we get him here under a suitable format?

As I said before, I would think it unwise to arbitrarily strike out everything that he said to this point, and I would presume that we would have some interest in hearing from him, because I note that one of the areas that was referred to in discussing his evidence earlier, was the fact that he'd written some papers in the area of standard setting, and of course that's something which the government would be very interested in.

DR. DUPRE: Very well ... Oh, Mr. Hardy?

MR HARDY: Mr. Chairman, could I just indicate that I believe that the governing principle for what the Commission should decide to do, is what would best enhance the record they're attempting to make here, in order to help write a good report for the Ministry of Labour, and the Government of the province.

In that respect, it seems to me that there's been a good deal of interest in fully hearing out Dr. Kotin and his views, and I think that Dr. Kotin, given his continued willingness and commitment to come back here, should be invited once again, scheduled by the Commission, and heard by the Commission, in order to fully develop the record that was started last ...

DR. DUPRE: The Commission now takes as completed, the submissions that parties wish to make. We shall now rise for a lunch break, and reconvene at two o'clock.

THE INQUIRY RECESSED

THE INQUIRY RESUMED

DR. DUPRE: May we reconvene?

5 Ladies and gentlemen, the Commission has duly considered the submissions made to us this morning, expresses its gratitude to all the parties who have made these submissions, and is now prepared to make its ruling, which is as follows.

10 What is essential, is that the Commission respect to the full, its terms of reference, in its obligations to the Lieutenant Governor in Council, and the public of Ontario.

15 It is the task of this Commission to formulate recommendations in the area of occupational health, with particular regard to the regulation of asbestos. Regulation of occupational health in Ontario, attaches great importance to the development of health policies and regulations, through the enhancement of cooperation among government, labour, and management.

20 The circumstances that lead to the present ruling, indicate that the role of management may be complicated when a multi-national corporation is involved. A particular instance of such complications may or may not arise when a multi-national corporation is involved in court litigation in foreign jurisdictions.

25 Whatever the case, it is the duty of this Commission, in formulating its recommendations, to be as cognizant as possible of any and all complications that may arise in the realm of occupational health policy.

30 With this overall consideration in mind, the Commission specifically rules as follows.

First: with respect to Dr. Kotin's testimony, the

DR. DUPRE: (Cont'd.) Commission wishes to retain this testimony as part of its public record.

This includes the testimony given by Dr. Kotin in direct examination. When an objection was made on July 23rd to a question asked by Miss Jolley, in cross-examination, the Commission notes that the substance of a particular question was in the realm of health effects, and was materially different from many questions asked on direct examination. This alone, gives the entire body of Dr. Kotin's testimony continued relevance to the work of this Commission.

Now secondly: with respect to Dr. Kotin's voluntary undertaking to reappear before this Commission notwithstanding any misunderstandings, which, if they took place, may have been occasioned by the complexities inherent in large corporate enterprises, the Commission deems it more important than ever, that this voluntary undertaking be fulfilled. Accordingly, the Commission will undertake to invite Dr. Kotin to reappear on a mutually agreeable occasion, on the same terms which he volunteered, namely, that he will be prepared to answer any questions which will be put to him, and be accompanied by counsel.

It may or may not be that Dr. Kotin will be advised not to answer certain questions.

It may or may not be that he will be advised to disregard Commission rulings.

If such events transpire, they and the grounds on which they take place, can only enhance the knowledge with which the Commission can formulate

5 DR. DUPRE: (Cont'd.) its recommendations to Government. The same holds for any Court decisions that might result from legal action initiated either by a party or by the Commission, if such events transpire.

10 Now finally: in that the circumstances of this ruling indicate that multi-national corporations may pose special challenges in the realm of occupational health policy, the Commission wishes to have done all it can to be as knowledgeable as possible, before Dr. Kotin's return.

15 Accordingly, the Commission will undertake to call as witnesses, corporate representatives of Johns-Manville, who are resident in this jurisdiction, before Dr. Kotin's appearance. To ensure that these appearances take place at times suitable to the Commission's crowded schedule, the Commission will issue summonses to the individuals involved.

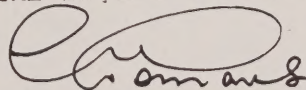
20 This then is the Commission's ruling.

May I suggest then that we now adjourn?

We stand adjourned sine die.

Thank you very much.

25 THE FOREGOING WAS PREPARED
FROM THE TAPED RECORDINGS
OF THE INQUIRY PROCEEDINGS



30 C. Leslie Homans

